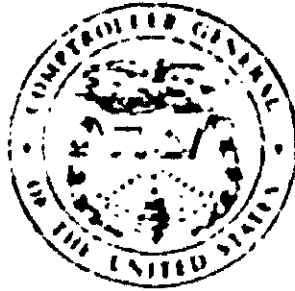


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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201853.3

DATE: August 9, 1982

MATTER OF: NBI, Inc.

DIGEST:

1. Concept of responsiveness is generally not applicable to negotiated procurements but is often used to signify that certain requirements are material and that a non-conforming proposal may be unacceptable. An affirmative response on a questionnaire indicating that a proposed printer meets a mandatory specification may be considered acceptable so long as there is nothing contradictory in the proposal. References to a "burst" or mid-line speed of 40 characters per second are not inconsistent with a requirement for 35 characters per second measured over a whole page.
2. Benchmarks are part of the technical evaluation of proposals and should not be conducted on a strict pass/fail basis; rather, benchmark results should be viewed as strong evidence of system capabilities which must be considered in determining technical acceptability. However, agency acted unreasonably in accepting proposal notwithstanding failure to demonstrate 35 character per second printer in benchmark. Since offeror would have been entitled to rerun of benchmark to prove compliance, notwithstanding agency statement that deficiency was minor, agency should assure that contractor is complying and if items furnished by contractor do not comply, contract should be terminated.
3. Requirement for a minimum 35 character per second printer, based on balancing the requirement for maximum practicable competition, based on a market survey,

B-201853.3

against a need to limit noise by reducing the time the printer is in operation, is reasonable. Failure to reject outright an alternate best and final proposal offering a 28 character per second printer, which was second low in price and not accepted, does not convince us that the agency overstated its printer speed requirement in the face of the agency's plausible and uncontroverted explanation that the failure to reject was an error.

NBI, Inc., protests the Department of the Navy's award of a contract to Xerox Corporation for the furnishing of word processing equipment to be used both aboard ships and at shore installations under solicitation No. N00600-80-R-F864.

NBI contends that the Navy's award of the contract to Xerox was improper because: (1) Xerox's proposal was not responsive to the solicitation; (2) Xerox's proposal should have been rejected because Xerox failed--or should have failed--the required benchmark; and (3) the Navy overstated its minimum needs.

This same procurement has also been the subject of another protest, Centennial Systems, Inc., B-201853.2, April 16, 1982, 82-1 CPD 350, and litigation in the United States District Court for the District of Columbia, Centennial Systems, Inc. v. United States, et al., Civil Action No. 81-2532, on different grounds.

The request for proposals (RFP) was for an indefinite quantity contract for the furnishing of word processing equipment, including hardware, software, operator and technician training, spare parts and vendor support. The RFP identified numerous system requirements, including a mandatory requirement that the printer operate at a minimum speed of 35 characters per second (CPS) calculated by measuring the time it took to print a full page (45 lines of 55 "x"'s at 10 characters per inch). Offerors were to respond to the RFP's technical requirements both in a narrative and by responding to a "Systems Requirements Questionnaire--Mandatory Features."

Technical acceptability was to be determined in two stages: First, proposals were measured against the requirements in the RFP and those proposals which the Navy determined could not be made acceptable were eliminated; second, the remaining offerors were required to perform a "benchmark operational capability demonstration" to demonstrate the capability of their system to perform all of the mandatory requirements. The RFP stated that "Offerors who do not successfully complete the benchmark test will be rejected as technically unacceptable." The contract was to be awarded to the lowest cost, technically acceptable offeror.

Xerox proposed to provide its model 860 system with a Diablo 630 printer (manufactured by Xerox) modified to meet the 35 CPS mandatory minimum print speed requirement. In the narrative portion of its proposal, Xerox described its compliance with the print speed requirement by stating that this "printer has a burst speed of 40 CPS." ("Burst speed" is a measure of the print speed at the middle of a line; it differs from the RFP's specified whole page average measurement in that "burst speed" does not take into account the delays which normally occur at the end of each line while the paper is advanced to the new line and the direction of the printhead is reversed.) In its "Systems Requirements Questionnaire," Xerox responded positively to a question concerning whether its printer satisfied the 35 CPS requirement measured by the Navy's full page standard. Xerox's printer tested at 33 CPS in the benchmark. After some discussion, and assurances from Xerox representatives that the printer was capable of more than 35 CPS, the Navy determined to waive the printer's benchmark performance as a minor discrepancy and judged Xerox's benchmark to have been successfully completed.

Both Xerox and NBI were among the offerors submitting best and final offers. NBI also submitted an alternate best and final offer which proposed to furnish an unmodified Diablo 630, rated at 28 CPS, instead of the more expensive Diablo 1355 offered in NBI's primary proposal which met the Navy's 35 CPS requirement. Upon reading the cover letter to NBI's alternate, which summarized this information, the

Navy's negotiator and principal contracting officer's representative, Lieutenant Lee, contacted Mr. Walter Mackie, the contracting officer's technical representative, concerning the acceptability of NBI's alternate proposal. Lieutenant Lee advised Mr. Mackie that NBI was offering the Diablo 630 printer; the Navy states that the rated speed of the printer was not discussed. Mr. Mackie, who had witnessed Xerox's benchmark, indicated that NBI's alternate proposal was acceptable. NBI's alternate was the second low offer. The contract was awarded to Xerox.

NBI contends that the Navy should have rejected Xerox's proposal as nonresponsive to the solicitation because Xerox did not clearly offer a 35 CPS printer in its proposal and failed to demonstrate a 35 CPS printer in its benchmark. NBI also asserts that the Navy's acceptance of Xerox's benchmark performance violated the mandatory requirement in the solicitation for offerors to demonstrate a 35 CPS printer. Alternatively, NBI argues that the 35 CPS printer requirement exceeded the Navy's minimum needs and concludes that the procurement should be reopened with a new statement of the Navy's minimum needs. We will consider these three arguments in turn.

"Responsiveness" of Xerox's Proposal

As a threshold matter, we should point out that the concept of "responsiveness"--whether a bid conforms to all of the material terms and conditions of a formally advertised procurement--is generally not applicable to a negotiated procurement such as was conducted here. The term is often used, however, to denote that certain terms and conditions are material and that a proposal which fails to conform to them may be considered unacceptable. Computer Machinery Corporation, 55 Comp. Gen. 1151, 1154 (1976), 76-1 CPD 358. We believe the term is used in this context here.

NBI's contention that Xerox's proposal was nonresponsive is premised on Xerox's use of "40 CPS burst speed" in its proposal to demonstrate compliance with the requirement for a speed of 35 CPS measured over a full page. NBI asserts that Xerox's different measure of printer speed could not provide a basis for a determination that Xerox intended to provide a

35 CPS printer measured by the Navy's standard and that even when considered in conjunction with Xerox's questionnaire response, that Xerox's proposal was at best ambiguous on this point. In effect, NBI contends that the Navy could not reasonably determine from Xerox's proposal that Xerox intended to meet the 35 CPS requirement. We disagree.

In our view, the Navy could rely on Xerox's representation in the questionnaire that its offered printer satisfied the 35 CPS requirement so long as there was nothing contradictory or inconsistent in Xerox's proposal. Despite NBI's suggestion to the contrary, we find no such inconsistency in Xerox's use of "burst speed" in other parts of its proposal since a mid-line print speed of 40 CPS is not necessarily inconsistent with a print speed of 35 CPS measured by the Navy's method. (We note in this connection that NBI's own proposal described its printer as "rated" at 40 CPS, without defining what "rated" meant, and it tested at 36.9 CPS using the Navy's technique.) Contrary to NBI's allegation of an ambiguity, we think that the only reasonable interpretation of Xerox's proposal is that Xerox intended to meet the RFP's whole page 35 CPS requirement with a printer which had a burst speed of 40 CPS. Consequently, we believe the Navy had a reasonable basis for its determination that Xerox's proposal was acceptable on this point.

Acceptance of Xerox's Benchmark

The Navy states that it considered Xerox's benchmark performance to be satisfactory and regarded the performance of Xerox's printer at 33 CPS instead of the required 35 CPS to be a waivable minor discrepancy. NBI, however, notes that the RFP established the 35 CPS printer speed as a mandatory requirement and points out that the RFP required that offerors demonstrate in their benchmarks that the "hardware/software proposed can perform all mandatory requirements" and stated that "offerors who do not successfully complete the benchmark test will be rejected as technically unacceptable." Drawing on this language, NBI asserts that the Navy had no discretion to waive the 33 CPS performance of Xerox's printer and instead was required to reject Xerox's proposal as technically unacceptable.

We view benchmarks as extensions of the technical evaluation of proposals, the principal purpose of which is to provide a demonstration of the capability of offered hardware and/or software to perform the required functions, which must be "judged in the light of the requirement for further discussions with all responsible offerors within a competitive range, price and other factors considered." 47 Comp. Gen. 29, 53 (1967). Consistent with this view, we have long been critical of benchmarks in which the strict application of pass/fail criteria leads to the automatic and final exclusion of a potentially acceptable proposal, see 47 Comp. Gen. 29, supra, and have held instead that benchmark results are "strong evidence" of system capabilities which must be considered in the determination of technical acceptability. Digital Equipment Corporation, B-183614, January 14, 1976, 76-1 CPD 21, at 7; The Computer Company, B-198876, October 3, 1980, 80-2 CPD 240, aff'd, B-198876.2, January 2, 1981, 81-1 CPD 1; Federal CSS, Inc.; Martin Marietta Data Systems, B-198305, October 29, 1980, 80-2 CPD 327. The real question, therefore, is whether the Navy could reasonably accept the results of Xerox's benchmark as satisfactory evidence of the technical acceptability of Xerox's proposal notwithstanding Xerox's failure to demonstrate strict compliance with the Navy's 35 CPS requirement. We conclude that the answer is no.

We find it significant that Xerox offered a Diablo 630 modified to increase its print speed to 35 CPS rather than a standard off-the-shelf item. (In this regard, we note that in its alternate best and final offer, NBI offered an unmodified Diablo 630 rated at 28 CPS.) In our view, the apparent necessity for--and the fact of--Xerox's modifications to the printer introduced an added element of uncertainty concerning the adequacy of the modifications themselves which, in the absence of evidence of prior experience with these modifications, could not reasonably be disregarded. Consequently, on the record before us, we do not view Xerox's failure to show compliance with the 35 CPS requirement to be a waivable "minor discrepancy" as the Navy refers to it and, under the terms of the RFP, Xerox's proposal was unacceptable and should not have been eligible for award. International Computaprint Corporation, 55 Comp. Gen. 1043 (1976), 76-1 CPD 289.

On the other hand, we have in the past found that where a failure occurs during a benchmark the agency has a duty to point out such failure to the offeror at that time and permit the offeror to rerun that portion of the benchmark to see if it can be successfully completed. The Computer Company--Reconsideration, B-198876.3, January 2, 1981, 81-1 CPD 1. Instead, the Navy pointed out the failure but downplayed its significance to Xerox. In this regard, we note that Xerox's representatives were surprised at the failure and it appears, from the record before our Office, that Navy officials indicated that this failure would not effect the acceptability of Xerox's proposal. Consequently, while we view Xerox's failure to successfully demonstrate the 35 CPS mandatory requirement to be a bar to a proper award at that time, under our prior decisions, Xerox was entitled to rerun the benchmark to show that its printer could attain the required speed. Since this was not done and the contract has been awarded, we believe the only practical remedy now would be for the Navy to assure that Xerox is delivering printers under the contract which comply with this mandatory requirement, especially in view of the following discussion that the Navy's minimum need is still 35 CPS. If the delivered items fail to comply, we believe the remainder of the contract should be terminated and a recompetition held.

Minimum Needs

The Navy justified the 35 CPS print speed requirement as a compromise between the conflicting objectives of maximum competition and noise abatement aboard ship. With respect to the noise problem, the Navy operated on the premise that the faster a printer operated, the less time it would actually be in operation--thereby reducing the duration of printer noise. On the other hand, as the result of a market survey, the Navy determined that requiring a print speed faster than 35 CPS would restrict competition unacceptably. As a consequence, the Navy established 35 CPS as its minimum printer requirement.

NBI contends that the Navy's actual minimum need was for the quietest possible printer, without regard to printer speed, and that the Navy's 35 CPS requirement therefore exceeded the Navy's minimum needs. As supporting evidence, NBI relies on what it asserts

was the Navy's acceptance of Xerox's nonconforming printer, a subject we have already discussed, and the apparent acceptability of NBI's alternate proposal to furnish a 28 CPS printer. In response to NBI's latter proposition, the Navy states that Lieutenant Lee's failure to reject NBI's alternate proposal was an error. The Navy also points out that no offeror was prejudiced by the apparent acceptance of NBI's alternate because it was not the low offer and the contract was not awarded to NBI. NBI contends that there was prejudice because NBI submitted its alternate in the expectation that if the Navy found the 28 CPS print speed satisfactory, the Navy would seek a new round of best and final offers (with an opportunity for NBI to lower its price) on a restated requirement.

We find no basis to question the Navy's determination of its minimum needs.

Initially, we note that NBI's reference to the Navy's apparent acceptance of NBI's alternate proposal does not persuade us that the Navy misstated its requirements. The Navy states that its apparent acceptance of NBI's alternate proposal was the product of Lieutenant Lee's reliance on technical advice, obtained informally from Mr. Mackie who did not have the opportunity to examine NBI's alternate at the time, which turned out to be erroneous. Given the circumstances, and because we would not have expected NBI's alternate to have been the subject of close scrutiny since it was not the lowest priced best and final, we find the Navy's explanation plausible and NBI has offered no persuasive evidence to the contrary.

Moreover, the Navy has stated numerous times in its various reports on the protest to our Office that its needs are still for 35 CPS and this level of performance will not be waived under the contract. We believe our recommendation will assure this result.

The protest is sustained.

for *William J. Fowler*
Comptroller General
of the United States